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No. 185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York,

Petitioner,

against

WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC., IN OPPOSITION

TOLBERT, EWEN & PATTERSON,
Attorneys for Western Perishable Carload Receivers Association of New York, Inc., Respondent.

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DOUGLAS H. THAYER,
of Counsel.

August, 1942.

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In the Matter of the Claim for Benefits Under Article 18 of the Labor Law of the State of New York, made by SYLVIA PERRY,

Claimant-Petitioner.

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WESTERN PERISHABLE CARLOAD RECEIVERS ASSOCIATION OF NEW YORK, INC.,

Respondent.

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Opinion Below

The opinion of the Court below is reported in 287 N. Y. 539 (R. 46).

Jurisdiction

The jurisdiction of this Court is sought to be invoked under Section 237 of the Judicial Code of the United States [28 U. S. C. A., Section 344, subdivision (b)]. Respondent claims that no jurisdiction exists.

Question Presented

Whether the respondent is an employer of the claimant-petitioner within the meaning of Article 18 of the Labor Law of New York (McKinney's Consolidated Laws of New York, Volume 30, Sections 500, et seq.)

Statute Involved

The pertinent portions of the statute involved will be found in the Appendix of petitioner's brief.

Statement

The respondent is a membership corporation organized under the Laws of the State of New York and is composed of dealers in fruits and vegetables who as individuals had been unable to obtain certificates of inspection from the Government as to the condition on arrival of merchandise shipped to them, and for this reason formed a corporation (R. 16, 17). The respondent for the purpose of obtaining Federal inspection of the merchandise received by its members (R. 33), then entered into an agreement (R. 33, Employer's Exhibit B received in evidence, R. 19, 22) with the Bureau of Agricultural Economics of the Department of Agriculture whereby it was to secure the signature of all of its members to contracts for the inspection of their tonnage at the rate of $2 per car, which money was to be deposited in a special fund from which payment of expenses was to be made on vouchers initialed or submitted by a Federal inspector (R. 33). Only such payments were to be made from this fund as were certified by the inspector to be essential (R. 33). "To guarantee the salaries" of the inspectors and other employees under this agreement for the first month, the Association agreed to deposit $3,000 (R. 34) and to pay the cost and expenses of this service plus 15 cents for each

car inspected, the cost specifically being the salaries of the clerks and inspectors (R. 33, 34). This payment was to be made "as an offset" to the Federal expense of the work to the Disbursing Clerk of the United States Department of Agriculture (R. 33), although as a matter of practice the checks were drawn by the Association to the order of the ultimate recipients. Inspection of the merchandise was to be made wherever practicable and the Association or its individual member who was the Receiver of the car inspected received an original and two carbon copies of each certificate issued.

The agreement further provided that since the Association and its members were guaranteeing the expense of the work, the services of the inspectors employed under this agreement should not be available to others at a similar charge, but the Association agreed that any receiver of fruits and vegetables in Greater New York would be admitted to membership on the same terms as its other members (R. 34). The inspectors were to be selected, trained, licensed and supervised by the Bureau of Agricultural Economics and the Federal Supervisor was to approve their salaries and determine their assignments (R. 34). Any complaint with regard to their work was to be made to him and they were not to be interfered with by any member of the Association (R. 34). The Bureau was allowed, if it desired, to advance the money for any of the expenses under the agreement and the reimbursement therefor was to be made by the Association by payment to the Disbursing Clerk of the Department of Agriculture and monthly bills by the Bureau were provided for (R. 35). The agreement as amended was terminable by mutual consent or by thirty days written notice given by either party to the other (R. 36).

The testimony shows that the terms of this agreement were in no way varied and that the parties thereto fulfilled all of its terms. The inspectors and clerks engaged in this work were neither hired, discharged, nor controlled, by the

Association (R. 18), which had no dealings whatsoever with the personnel. The names of the inspectors and clerical workers were only known on the receipt of the payroll forwarded to it by the Bureau (R. 18, 21, 22), and they were responsible only to the United States Government and worked according to its standards and specifications (R. 26). The claimant-petitioner was hired by Mr. Hackleman, the inspector in charge of the New York Bureau of Agricultural Economics (R. 24, 25), she took all orders from him, worked in the office of the Department of Agriculture and never even saw any member of the respondent (R. 22, 23). Her salary was received at the Department office by means of a check drawn by the Association (R. 23). Some deductions were made from her salary for Social Security (R. 23) which were later refunded (R. 30, 31), and there is evidence that the Association carried a Workmen's Compensation Policy covering the inspectors but not the claimant-petitioner (R. 24, 30). She was not subject to the Civil Service or required to belong to any Retirement Fund, nor did she contribute from her salary to any Pension Fund (R. 25). The certificates obtained by the Association were not required by law (R. 17), and, although its President testified that they were of doubtful value, the evidence indicates that they were helpful to the railroads, shippers and receivers or consignees (R. 20, 21, 28-30). The certificates were not, however, relied on by the buyers of the merchandise (R. 31, 32).

The Court of Appeals has on these facts determined that respondent is not the employer of the claimant-petitioner and this decision is sought to be reviewed.

Argument

Summary of the argument:

1. No substantial Federal question is here involved.
2. The decision may be sustained on Non-Federal grounds.

I

No substantial Federal question is here involved.

No right or liability under any Federal statute has here been denied, sustained, or even asserted. That the Court of Appeals never understood any Federal question to be presented is clear.

> "* * * The question presented upon this appeal is whether these employees are entitled to benefits from the unemployment insurance fund established by article 18 of the Labor Law (Cons. Laws, ch. 31), added by chapter 468 of the Laws of 1935, and whether the association is their 'employer' as that term is defined in the statute and is liable for contributions to the fund based upon the salaries of these employees."
>
> *Matter of Perry,* 287 N. Y. 539, 543 (R. 48).

The Referee (R. 8, 9) the Unemployment Insurance Appeal Board (R. 5) the Appellate Division of the Supreme Court (R. 41) understood no other question to be involved. The question being one of local law and of the construction of a State statute, no jurisdiction here exists.

> *J. Bacon & Sons* v. *Martin,* 305 U. S. 380; 83 L. Ed. 233.

The only right asserted by the claimant-petitioner is to unemployment insurance benefits under the law of the State of New York. The only liability of the respondent asserted by the petitioner is for payment of taxes under the same law. It not appearing that any title, right, privilege or immunity under any statute of the United States has been claimed, jurisdiction must be declined.

> *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206, 212, 213; 82 L. Ed. 751, 755;
> *Honeyman* v. *Hanan,* 300 U. S. 14, 18; 81 L. Ed. 476, 479.

The fact that the Court of Appeals in its opinion considered the Perishable Agriculture Commodities Act of 1930 (U. S. C. A., Title VII, Chapter 30A) will not confer jurisdiction, since, if it is the petitioner's contention that the Court's construction of this statute is incorrect and that the Department of Agriculture had no power to hire the claimant-petitioner under this statute, despite its express terms, [7 U. S. C. A., Sec. 499 (o)], such contention is clearly frivolous and without merit.

No conflict exists between the decision of the Court of Appeals and that of any Federal Bureau,* nor is it shown how, if such conflict existed, this would constitute a basis for jurisdiction. In any event no conflict can arise from apparently divergent rulings on the same state of facts where different statutes are applied and it is conceded that there is no conflict between the decision of the Court of Appeals and any Federal Court.

Petitioner relies upon *Denton* v. *Yazoo and Mississippi Valley Railroad Company, et al, respondents,* 284 U. S. 305, and upon *Standard Oil Company of California* v. *Charles G. Johnson, as Treasurer of the State of California,* 86 L. Ed. 1063 (Adv. Ops.), neither of which supports her claim to jurisdiction.

In the *Denton* case the question arose under Federal law by which all railway common carriers were required to transport mail under conditions prescribed by the Postmaster, among them being that the Railroad Company furnish the men. In so far as it held that the petitioner in that case was the employee of and doing the work of the United States, it is in accord with the decision here sought to be reviewed. The *Standard Oil* case involved an

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*The ruling referred to in Petitioner's brief, p. 17 has never been in operation; it was based on the erroneous decision of the Appellate Division and held in abeyance pending the decision of the Court of Appeals.

action for the recovery of gasoline taxes paid on sales to the United States Army Post Exchanges in California. Recovery of the taxes paid was sought and the appeal was granted on the ground that the State statute was repugnant to the Federal Constitution.

II

Ample non-Federal grounds exist to support the decision of the Court of Appeals.

As previously stated, the Court was under no misapprehension that any question existed, other than under Article 18 of the Labor Law, whether respondent was the employer of the claimant-petitioner. The same authorities cited on page 14 of petitioner's brief were advanced to the Court of Appeals in connection with this question and found inapplicable or unpersuasive.

The claimant-petitioner was hired by an Inspector of the United States Department of Agriculture. She performed her work in its office. She reported to, and was supervised by, the inspector in charge. Her working hours, assignments and the manner of execution were determined by the inspector. Her salary was fixed by the Bureau and paid to her at the Bureau office. She was subject to discharge by the Bureau only and was engaged in its business, which was the issuance of Government Inspection Certificates. No control of any nature was exercised over her by the respondent. Under any test the conclusion is inescapable that she was not the employee of the respondent.

Standard Oil Co. v. *Anderson*, 212 U. S. 215; 53 L. Ed. 480;
Irwin v. *Klein*, 271 N. Y. 477;
Matter of Beach v. *Velzy*, 238 N. Y. 100.

Even if the judgment of the court in fact had rested on Federal grounds, the non-Federal grounds adequately support it and jurisdiction fails.

Fox Film Corp. v. *Muller,* 296 U. S. 207; 80 L. Ed. 158.

Conclusion

No substantial Federal question has been shown to be involved here and no grounds have been advanced to justify a review of the decision of the Court of Appeals. The decision is of no general importance, having no operation outside of the State, and its application within the State is confined to this respondent only. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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